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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GERARDO ALVAREZ SILVA, Defendant and Appellant.	F075955 (Super. Ct. No. 16CR-01308) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Matthew H. Wilson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Jennifer Oleksa, Deputy Attorneys General, for Plaintiff and Respondent.

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Gerardo Alvarez Silva appeals from judgment after conviction by jury of two counts of first degree murder,[1] each with multiple murder and kidnapping special circumstances,[2] and two counts of kidnapping[3]. Gerardo[4] was part of a group of men who, purportedly as retribution for an alleged marijuana theft, seized two victims, bound them, transported them to an orchard, murdered them there, placed their bodies inside a car, and incinerated them by setting fire to the car. He received two consecutive sentences of life without the possibility of parole, plus consecutive sentences of eight years and five years for the kidnappings. We affirm.

BACKGROUND

The evidence at trial showed that Gerardo's uncle, Heliodoro Silva, maintained an operation for growing marijuana for sale at a property in Atwater, and had another house in Winton. In addition to Heliodoro and Gerardo, participants in the marijuana operation included Heliodoro's other nephew Salvador Silva (Salvador), Bernardo Rangel, and Monico Peña. A number of pounds of marijuana were stolen from the operation, and suspicion fell on two additional associates, R.G. and R.S.

The key evidence came from Salvador, who had been charged in the matter and was allowed to plead guilty to a reduced charge in exchange for his testimony. According to Salvador's testimony, aspects of which were impeached with evidence of his statement to the police, he went to Heliodoro's Atwater house on Saturday, October 18, 2014, where he saw R.G. and R.S. R.S. was bound and bleeding from the head, where Rangel had struck him with a handgun. Heliodoro, Gerardo, Rangel, Peña and

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1 Penal Code section 189. Subsequent statutory references are to the Penal Code unless otherwise noted.

2 Section 190.2, subdivision (a)(3), (a)(17)(B).

3 Section 207.

4 When multiple people with the same last name are referred to in this opinion, we use first names to avoid confusion.

Peña's nephew, known as Junior, were present. There was discussion of the possibility that someone would be bringing money to buy the freedom of R.S. and R.G. Gerardo told Salvador that R.S. and R.G. would be killed if the money was not forthcoming.

Late that night, according to Salvador's testimony, Heliodoro announced that the group was taking R.S. and R.G. to another location. Salvador stayed behind and heard nothing more of the matter that weekend.

On Monday, October 20, 2014, Salvador testified, Heliodoro called Salvador and told him to come to the Winton house. There, Heliodoro and Gerardo told Salvador R.S. and R.G. were dead. Gerardo described the events of the previous night. In a caravan of cars, Heliodoro, Gerardo, and Peña transported R.G and R.S., bound, to the orchard. In the orchard, Gerardo fired multiple shots into the face of R.S. Peña crushed R.G.'s skull with a baseball bat. Their bodies were placed in one of the cars, soaked with fuel, and lit on fire. Gerardo said he participated in the killings only because Heliodoro ordered him to do so and threatened him.

In the morning, workers at the orchard found the burned-out car with the bodies, mostly consumed by fire, inside. R.S., who was identified through dental records, died of gunshot wounds to the head, and R.G. died of blunt force injuries to the head. Also, R.G.'s larynx had been cut with a sharp implement. A bloody baseball bat bearing a fingerprint of Peña's was found at the scene, as were a bloody knife and spent casings of shells fired from a handgun found in Heliodoro's Winton house. DNA testing showed the blood on the bat and knife was R.G.'s.

In his statement to the police, Gerardo admitted it was he who shot R.S. He also said Peña was the one who killed R.G. with the bat. Gerardo helped load the dead bodies in the car before it was burned. He claimed he acted in self-defense.

DISCUSSION

I. Section 654

The trial court did not err when it declined to apply section 654 to stay the sentences for kidnapping.

Section 654 provides that a defendant cannot receive multiple punishments for a single act, or for a course of conduct unified by a single criminal objective, even though that act or course of conduct is punishable in different ways by different provisions of law. (*People v. Bauer* (1969) 1 Cal.3d 368, 376; *In re Ward* (1966) 64 Cal.2d 672, 675-676; *Neal v. State of California* (1960) 55 Cal.2d 11, 19, overruled on other grounds by *People v. Correa* (2012) 54 Cal.4th 331, 344.) We review under the substantial evidence standard the court's factual finding, implicit or explicit, of whether or not there was a single criminal act or a course of conduct with a single criminal objective. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1408.)

In participating in the kidnappings and murders in this case, Gerardo shared in the group's two objectives: to try to recover money for the missing marijuana as a ransom for R.S. and R.G., and, when that failed, to kill them as punishment. The trial court expressly found these two objectives at the sentencing hearing. It stated that Gerardo and the other participants sought money while they were holding the victims at the Atwater house, moving them to the Winton house, and continuing to hold them at the Winton house. Eventually, they stopped waiting for the money and opted to kill the victims instead.

Substantial evidence in the record supports these findings. According to Salvador's testimony, Gerardo said the victims would be killed if the money were not received. This statement alone indicates the two objectives, one following the failure of the other. The overall outline of the facts confirms what Gerardo told Salvador. There was no reason to hold the victims so long, or to transport them from the Atwater house to

the Winton house before transporting them to the orchard, rather than directly to the orchard, if the goal had always been only to kill them.

Gerardo suggests that the ransom objective existed only during the victims' captivity in the Atwater house, and that this was before the kidnappings began, because there is no evidence of asportation before the movement of the victims from the Atwater house to the Winton house. Therefore, the only objective of the kidnappings was to kill the victims, and since the murders had the same objective, punishment for both offenses was barred.

This argument presupposes that the ransom motive ceased the moment the group undertook to move the victims from one house to the other. But there is no reason to believe this. Gerardo claims the discussions about ransom took place only at the Atwater house, but even if this is so, it does not show the ransom motive disappeared when the group departed from the Atwater house. It is not the case that an objective exists only while someone is speaking about it aloud. If the ransom had been delivered to the Winton house, would it have been rejected because the objective of receiving it had dissipated?

The evidence showed Gerardo and the others had an objective of obtaining ransom while the victims were detained at the Atwater house. At some time, an objective of killing the victims to punish them if the ransom was not forthcoming was adopted as well. The trial court could reasonably infer that the dual objectives—to obtain ransom, and failing that to punish by killing—coexisted for some time after the asportation of the victims to the Winton house began. This is, in fact, the *more* reasonable inference. The notion of the ransom objective abruptly cutting off before the victims were moved and being replaced by killing as the sole objective is an improbable one.

II. Jury Instructions on Multiple Murder Special Circumstance

The instructions the trial court gave the jury on the two multiple murder special circumstances contained an error: It allowed the jury to find those special circumstances

true, even if Gerardo was not the actual killer, without finding that he acted with the intent to kill. Since the evidence indicated that Gerardo was the actual killer of one victim (R.S.) but not the other, the jury's findings under this instruction could establish the special circumstance for only one murder, not both. This error was harmless beyond a reasonable doubt, however, because the jury necessarily found Gerardo had the intent to kill as to both victims when it found both of the kidnapping special circumstances true. This is because the instruction on *that* special circumstance *did* require a finding of intent to kill. (*People v. Johnson* (2016) 243 Cal.App.4th 1247, 1281 [where instructions would allow jury to reach conclusion without required finding, error is harmless if " 'other aspects of the verdict or the evidence' " prove finding actually was made].)

On the multiple murder special circumstance, the court gave two CALCRIM instructions, one of which was correct for that special circumstance, and one of which was not.

The correct instruction was in accordance with CALCRIM No. 721, and stated that the prosecution was required to prove Gerardo was guilty in this case of at least one count of first degree murder plus at least one additional count of first or second degree murder.

But this instruction alone was insufficient for one of the multiple murder special circumstances charged in this case, because there are additional elements in cases in which the defendant is not the actual killer (§ 190.2, subds. (c), (d)). The pattern instruction designed to state these elements for all the special circumstances *except for* the felony murder special circumstances (i.e., those in which the murder was committed in the course of one of the enumerated felonies) is CALCRIM No. 702. With the blanks suitably filled in, that instruction would have stated that if Gerardo was guilty of first degree murder but was not the actual killer, then the multiple murder special circumstance was true only if the prosecution proved Gerardo acted with the intent to kill.

Instead, the court erroneously gave an instruction in accordance with CALCRIM No. 703 for the multiple murder special circumstance. That instruction is meant to be used for the *felony murder* special circumstances in cases where the defendant is not the actual killer. The pattern instruction states that if the defendant is guilty of first degree murder but is not the actual killer, then a felony murder special circumstance is true only if the prosecution proves the defendant *either* acted with the intent to kill *or* began participating in "the crime"—meaning the predicate felony—before or during the killing, was a major participant in that crime, and acted with reckless indifference to human life when participating in it. The reason why this instruction is different from CALCRIM No. 702 is that, by statute, for the felony murder special circumstances only, being a major participant in and acting with reckless indifference during the predicate felony can substitute for the intent to kill. (§ 190.2, subd. (d).)

The court's use of the wrong pattern instruction on this point had two consequences. One was that it misstated the mental state requirement for the multiple murder special circumstance by giving the jury an alternative to the intent to kill. The other was that the instruction was garbled because no predicate felony is involved in the multiple murder special circumstance. The references to "the crime" thus appeared to refer to the killing, resulting in nonsense (the defendant's participation in the killing began before or during the killing, etc.).

For the felony murder (kidnapping) special circumstances, the court gave one instruction, CALCRIM No. 731. That instruction, which is designed to be used without CALCRIM No. 703, and covers the kidnapping and arson felony murder special circumstances only, applies when the prosecution's theory includes an intent to kill on the part of the defendant. The instruction was created because of section 190.2, subdivision (a)(17)(M). That statute provides that, for the kidnapping and arson felony murder special circumstances, where the defendant intended to kill, "it is only required that there be proof of the elements of those felonies," and when the elements are proven, "those two

special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder." (§ 190.2, subd. (a)(17)(M).) This provision was added to section 190.2 for the purpose of making an exception, in kidnapping and arson cases where the defendant intended to kill, to the judicially created requirement that the predicate felony and the killing must have independent purposes for a felony murder special circumstance to be true. (Stats. 1998, ch. 629, § 2.)

As given in this case, CALCRIM No. 731 stated that to prove the kidnapping special circumstance for each murder count, the prosecution had to establish that the defendant intentionally committed, aided and abetted, or was a member of a conspiracy to commit kidnapping; that the defendant did an act that was a substantial factor in causing the death; and that the defendant intended the victim to be killed.

Because of the erroneous use of CALCRIM No. 703, the jury's true findings on the two multiple murder special circumstances did not establish the intent to kill requirement as to one of the murder counts. But because the jury also returned true findings on both of the kidnapping special circumstances under CALCRIM No. 731, the instructions for which *did* require intent to kill as an element, the error in the multiple murder special circumstance instructions was harmless beyond a reasonable doubt. There is no question but that the jury made the necessary finding as to both victims.

Gerardo argues that the jury's true findings on the kidnapping special circumstances did *not* prove the jury found he intended to kill both victims because the jury received several other instructions that did not involve an intent to kill. For instance, the jury was instructed that it could find Gerardo guilty of murder if he aided and abetted kidnapping, or was a member of a conspiracy to kidnap, and the murders were a natural and probable consequence of the kidnappings.

This argument is without merit. The fact that the jury was told it could make certain findings based on one mental state does not mean it was incapable of

understanding an instruction involving another mental state. We assume, absent indications to the contrary, that a jury is capable of following the court's instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

DISPOSITION

The judgment is affirmed.

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SMITH, Acting P.J.

WE CONCUR:

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SNAUFFER, J.

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DESANTOS, J.